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No.

In The
Supreme Court of the United States
October Term, 1984

JACK R. BATTIPAGLIA et al.,
Petitioners,

vs.

NEW YORK STATE LIQUOR AUTHORITY et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the New York statutory restraint of price in the market for wholesale wine is invalid under the Supremacy clause and thus, unenforceable because it conflicts with the *Sherman Act,* 15 U.S.C.1 et seq.

2. Whether §2 of the Twenty First Amendment modifies the Supremacy Clause, so that a state regulating alcoholic beverages prevails over conflicting general federal law.

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NEW YORK STATE LIQUOR AUTHORITY et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JACK R. BATTIPAGLIA and BACCHUS SELECTIONS, INC. on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on September 21, 1984.

OPINIONS BELOW

The opinion of Judge Friendly for himself and Judge Graafeiland and the dissenting opinion of Judge Winter (Appendix A) are reported at 795 F. 2d 166. The opinion of the district court (Appendix C) and the judgment of that Court (Appendix D) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Appendix B) was filed on

September 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 101-b 3 (b) and 4 of the *Alcoholic Beverage Control Law* provides in pertinent part:

> "3(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers..."
>
> ****
>
> "4. Each such schedule required by paragraph (a) of

subdivision three of this section shall be filed on or before the twenty-fifth day of each month and the prices and discounts set forth therein shall become effective on the first day of the second succeeding calendar month and shall be in effect for such second succeeding calendar month. Each such schedule required by paragrph (b) of subdivision three of this section shall be filed on or before the fifth day of each month, and the prices and discounts set forth therein shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for such calendar month. Within ten days after the filing of such schedule the Authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. All schedules filed shall be subject to public inspection, from the time they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The Liquor Authority may make such rules as shall be appropriate to carry out the purpose of this section."

STATEMENT OF THE CASE

This is a proceeding commenced under 15 U.S.C. §26, Article VI, Clause 2 of the U.S. Constitution and 28 U.S.C. §1337 to declare §101-b of the Alcoholic Beverage Control Law (as it relates to wine) to be in violation of the *Sherman Act* and constitutionally invalid, and for an in-

junction against the enforcement of the above mentioned section.

§101-b of the Alcoholic Beverage Control Law mandates that before wine may be sold in the State of New York from wholesale distributors to retailers licensed to sell wine to the public, a schedule of the price determined solely by the wholesalers must be posted with the State Liquor Authority.

In addition, §101-b, Sub. 4 of the ABC Law mandates that the price schedules be made available for inspection by other licensees. Within three days after inspection, a wholesaler may amend his filed schedule. After this, the wholesaler must sell the wine at the posted price for a period of at least one month.

The Authority has no choice but to accept the price posted in the schedule and enforce that price. The Authority has no say over the amount that is posted.

On March 3, 1980, this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937 found a similar statute as violative of the *Sherman Act* and thus, held it invalid.

On September 8, 1980, the Court of Appeals of the State of New York in the *Matter of Mezzetti Associates Inc. v. S.L.A.*, 51 N.Y. 2d 761 held that §101-bbb of the Alcoholic Beverage Control Law (minimum consumer resale price to be charged by a retailer to the consumer as established by a wholesaler) was invalid and cited *Midcal* as its authority.

Since September of 1980 there is no minimum consumer resale price in the State of New York with respect to

wine. (*Mezzetti Associates Inc. v. State Liquor Authority*, 51 N.Y. 2d 761).

Since that time retailers have been forced through competition to sell wine at the lowest price.

The lowest price is what they paid for the product from a wholesaler. The price from the wholesaler is determined from the price posted with the State Liquor Authority.

A retailer cannot negotiate a price with a wholesaler other than what is posted.

This system at the wholesale level completely chokes off any desire to vary the price of wine to the retailers.

PROCEEDINGS BELOW

THE DISTRICT COURT

Petitioners brought this action October 8, 1980. By an opinion and order dated September 27, 1982 (Appendix C) the District Court denied plaintiffs' motion for summary judgment because it found no conflict between the challenged statute and the federal antitrust laws. It further concluded that even if the challenged statute was found to be in conflict with the federal law, the "state action" doctrine would immunize it from antitrust challenge. Finally, it expressed no opinion on the impact of the 21st Amendment upon the facts involved herein.

THE COURT OF APPEALS

This action was then appealed to the Second Circuit and was heard by a panel consisting of Judges Friendly,

Van Graafeiland and Winter. By a 2 to 1 decision, the Court affirmed. Writing for himself and Judge Van Graafeiland, Judge Friendly held that this Court's decision in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) was controlling and that plaintiffs "failed to make out a *case* of facial invalidity."[1] The majority ignored the fact that the statute involved herein restrains the price to the retailers which was not the case in the "vertical *non price* restraint found in *Norman Williams.* Further the majority herein seemed to place some significance to intra-brand competition versus inter-brand competition, which was relevant to the *Norman Williams* case, but has no bearing herein.

The majority opinion also felt that if *Norman Williams* did not apply, the state's interest should prevail under the balancing process "prescribed for cases where the procompetition policy of the federal antitrust laws comes in conflict with a state's exercise of the authority reserved to it by §2 of the Twenty First Amendment."[2]

In coming to this conclusion, the majority entirely missed the point of this case. Plaintiffs have attacked §101-b of the ABC law only as it affects *wine.* In trying to establish a strong state interest the majority quotes the New York State Legislature when it enacted the amended legislation in an Act of April 16, 1964 ch. 531, 1964 *N.Y. Laws 801, 807* §8.[3]

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1. Appendix A at 18a. The majority decision also left alone the "agreement" issue for a Sherman Act violation and it further expressed serious doubts as to whether the statute would survive a "state action" defense contrary to the decision of the district court.

2. Appendix A at 20a.

3. Appendix A at 22a-23a.

§8 concerns itself only with *liquor* which has nothing to do with the within case.

Judge Winter in his dissent stated that the legislation in question is a *per se* violation of the *Sherman Act.* He further stated that the legislation did not pass part two of the *Midcal*[4] test, namely that "the policy must be 'actively supervised' by the State itself".

Finally, Judge Winter concluded that the Twenty-First Amendment does not save the legislation in question. He stated that "the notion that this legislation was even remotely the result of political pressure exerted by aroused temperance groups is a quant fiction. The self-evident purpose of the statute is to create a cartel of liquor wholesalers for their benefit."[5]

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning a State's ability to create a statutory scheme that restrains commerce in the product market of wine in violation of federal law. The Court of Appeals has held that petitioners do not have a case of facial invalidity of §101-b of the ABC Law because the activity complained of was not a *per se* violation of the *Sherman Act.*

In reaching this conclusion, the Court below relies on this Court's decision in *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982). However, it is respectfully submitted that this reliance is totally misplaced.

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4. *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97 (1980).

5. Appendix A at 27a.

The *Norman Williams* case dealt with a California statute that allowed a distiller to designate which wholesalers in the State of California could sell the distiller's particular brand of alcoholic beverage.

This Court felt that its decision in *Continental T.V. Inc. v. GTE Sylvania Inc.* 433 U.S. 36 (1977) was the controlling precedent in the *Williams* case.

The decision in the *Williams* case indicated that the California statute dealt with the same type of "vertical non-price restraints" as found in *GTE Sylvania,* which restraints were to be judged under the "rule of reason" rather than under a *per se* rule of illegality.

In *Williams,* the statute in question (designation statute) "does not *require* the distiller to impose vertical restraints of any kind; that is a matter for it to determine." California's designation statute merely enforced the distiller's decision to restrain intrabrand competiton.

This Court further stated in *Williams* that "(A)fter our decision in *GTE Sylvania,* it cannot be said that every attempt by a manufacturer to restrain competition in its own products is illegal under the Sherman Act."

It is respectfully submitted that the *Williams* case has no application herein for two reasons.

First, the section involved herein (§101-b of the ABC Law) is a price restraint as opposed to a *non-price* restraint. The posted price for wine must be maintained for at least thirty days. Retailers such as petitioner, Battipaglia, cannnot go to the wholesaler and ask for a better price based on a quantity purchase with a minor statutory exception.

Second, the within matter has nothing to do with intra-brand competition versus inter-brand competition.

It makes no difference which brand of wine we are talking about.

Petitioner retailer, Battipaglia, must buy the product at the posted price, and because of competitive pressures on the retail level of the business, he cannot sell the product above what he pays for it.

So if, for example, a case of Lancer's Rose Wine were price posted to a retailer at $37.49, it makes no difference that an inter-brand competitor, such as Mateus Rose Wine, was posted at $31.92 a case.

The retailer such as petitioner, Battipaglia, has little reason to choose one brand over the other except for consumer preference because the cost to him becomes his selling price. This is the result of his competitiors at the retail level buying the product at the same posted price and trying to attract customers by selling at or near the posted price.

The price restraint statute contained herein discourages both intra-brand and inter-brand competition because there is no incentive for the retailer to choose one wholesaler over the other for the same product or to choose between competing products. The retailer makes no profit in either situation because of the posted price to him.

A retailer cannot go to a wholesaler and ask for a better price per case because this particular retailer can buy

1000 cases of a particular brand of wine as oppossed to 2.[6]

The price for either purchase would have to be the same because this is mandated by §101-b of the ABC law.

As the dissent of Judge Winter recognizes "the challenged legislation not only mandates the exchange of price information but also requires adherence to publicly announced prices until thirty days after notice is given of a new price. A requirement of adherence to announced prices has been uniformly held illegal without regard to its reasonableness. *Sugar Institute v. United States,* 297 U.S. 553, 601 (1936) ('steps....to secure adherence, without deviation, to prices and term...announced' are illegal). The Supreme Court emphasized as recently as 1980 the 'plain distinction between the lawful right to publish prices ...on the one hand and an agreement among competitors limiting action with respect to the published price, on the other' *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 649-50 (1980) (per curiam) See also *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897). The arrangement in question thus would be *per se* illegal if accomplished solely through private agreement, and our decision, therefore, is governed by *Midcal* rather than by *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982)."[7]

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6. Rule 16.12(c) [9 NYCRR 65.12(c)] defines a quantity discount. It states in pertinent part as follows: "A quantity discount may be granted only for quantities of two or more. If a price is listed for bottles only, then a quantity discount may be allowed on quantities of two or more bottles. If a price is listed for bottles and cases, then a quantity discount may be allowed on quantities of two or more cases only. Quantity discounts may be graduated, but may not exceed the maximum fixed in section 101-b [Alcoholic Beverage Control Law]. A quantity discount may be granted only for a quantity of the same brand and type of liquor or wine of the same or different sizes of containers."

7. Appendix A at 25a.

The majority opinion stated that this Court's decision in *Midcal* had no application herein because the legislation complained of herein did not create a "resale price maintenance scheme of the sort condemned in Midcal. In contrast to *Midcal,* each wholesaler is completely free to file whatever price schedules he desires, and his schedule now has no controlling effect on retail prices since §101-bbb, which prohibited retail sales at a price less than that established in a retail price schedule, has been declared to be unconstitutional by the New York Court of Appeals."[8]

The majority seems to indicate that the former resale price maintenance statute (§101bbb) was in some way connected to §101-b but this is completely without any basis. The resale schedule never was dependent on the wholesale prices posted under §101-b.

Further, it is respectfully submitted that the majority made light of Subdivision 4 of 101-b which allows a competitor to meet a fellow wholesaler's posted price, if the second wholesaler's price is lower, within three days after inspecting the price.

The section in question is not as the majority suggests when they say: "*(M)idcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more."[9]

New York's statute allows for much more. There is little reason for a wholesaler to vary its price knowing that a competitior can come in, review the price which must be

8. Appendix A at 11a.

9. Appendix A at 11a.

adhered to for at least thirty days, and match that price if such price is lower than its own.

It is also respectfully submitted that the majority missed the point of this case when it concluded that even if the *Norman Williams* case did not apply herein, that the balancing formula established in *Midcal* held in favor of the statute.

In showing the "strong state interest", the majority quoted the New York Legislature when it amended the ABC Law in 1964.[10] §8 dealt only with *liquor* which has no application to this case. Here we are only dealing with *wine.*

It must be understood that in the case of *wine* there is no legitimate defense of the statute in question under the doctrine of "state action".[11]

Unlike liquor, wine is not controlled in any way in the State of New York. There is no affirmation of the price as there is with liquor when it enters the borders of New York.[12]

Further, unlike liquor there is no "pass through provision" in connection with *wine.* The pass through provision of §101(b), Sub. 3(b) has locked in the price of *liquor* from a wholesaler to a retailer since June 10, 1967 unless there is a reduction or increase in the price posted pursuant to the schedule filed under Subd. 3(a) and (e). There are no equivalent subdivisions relating to *wine.*

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10. Appendix A at 22a-23a.

11. *Parker v. Brown,* 317 U.S. 341 (1943).

12. See §101-b, Subd.3(d) and (e).

The majority places great emphasis on the vigorous competition that exists on the retail level among wine retailers; however this emphasis is totally misplaced.

The basis of this case stems from the fact that since 1980 and the *Midcal* and *Mezzetti* decisions, the retail price for *wine* has gone down to the price the retailer pays for it. At the same time, however, because of the statute in question, the retailer cannot see a profit because the price he pays for wine is posted and adhered to by the wholesalers licensed to sell the wine to the retailers. These wholesalers cannot vary the price even if a particular retailer is in a position to purchase a particular *wine* in great quantity.

In concluding that *Midcal* as opposed to *Norman Williams* applies herein, Judge Winter in his dissent states: "(I)ndeed to hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive effect of which is the subject of great controversy, *see* R. Bork, *The Antitrust Paradox,* 288-91 (1978), but to allow them to authorize horizontal price fixing about which we all agree."[13]

The weighing process clearly is on the side of the federal interests in the case herein as they were in this Court's two most recent cases concerning the Twenty First Amendment. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S., 81 L.Ed.2d, 580, 104 S. Ct. and *Bacchus Imports Ltd. v. Dias,* 468 U.S., 82 L.Ed. 2d, 200 104 S. Ct.

As was stated by Judge Winter in his dissent:"(A)lthough I believe that the twenty-first amendment allows a state to limit consumption of alcohol by causing its price to be high, I also believe that in such an

13. Appendix A at 25a.

instance a state must do something more than authorize a cartel of dealers to seek out their profit maximizing price/output level. The issue need not be elaborated in dissent beyond stating my view that where state legislation merely legislates a cartel of liquor dealers and plays no further role in determining prices and output, its self-evident purpose is not to protect the public from the evils of the demon rum, but to perserve the high standard of living of those who sell it. Since the twenty-first amendment was plainly designed only to allow the states to legislate against the evils of intoxicating liquors rather than to reward its purveyors, I see no room for its application in the present case."[14]

CONCLUSION

For the above reasons, petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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14. Appendix A at 27a.

APPENDIX "A"
OPINION OF THE CIRCUIT COURT
FILED 9/21/84

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1381—August Term 1983
(Argued: June 11, 1984 Decided: Septemer 21, 1984)
Docket No. 84-7168

JACK R. BATTIPAGLIA and
BACCHUS SELECTIONS INC.,
Plaintiff-Appellants,

-against-

NEW YORK STATE LIQUOR AUTHORITY,
Defendant-Appellee,

PEERLESS IMPORTERS INC.,

Defendant-Intervenor.

Before:

FRIENDLY, VAN GRAAFEILAND and WINTER,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Richard Owen, *Judge,* granting motions for summary judgment by the defendant New York State Liquor Authority and wholesaler who had intervened as a defendant in an action by a wholesaler and a retailer which sought a declaration that certain provisions of §101-b of New York's Alcoholic Beverage Control Law are in violation of §1 of the Sherman Act and therefore unconstitutional and an injunction against their enforcement. Affirmed.

WINTER, *Circuit Judge,* filed a dissenting opinion.

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AUGUST L. FIETKAU, Assistant Attorney General of the State of New York, New York, New York (Robert Abrams, Attorney General of the State of New York, Melvyn R. Leventhal, Deputy First Assistant Attorney General, Richard G. Liskov, Assistant Attorney General, New York, New York), *for Defendant-Appellee.*

LAWRENCE KILL, New York, New York (Anderson Russell Kill & Olick, Steven M. Pesner, and Daniel N. Sang, New York, New York) *for Defendant-Intervenor.*

FRIENDLY, *Circuit Judge:*

Plaintiff Jack R. Battipaglia is the owner of a licensed liquor store in Long Island City, New York. Plaintiff Bacchus Selections Inc. is a licensed wholesaler of wines. In this action in the District Court for the Southern District of New York against the New York State Liquor Authority (SLA), they sought a declaration that certain provisions of §101-b of New Yorks Alcoholic Beverage Control Law requiring wholesalers to post and maintain schedules of prices and discounts violate §1 of the Sherman Act and are therefore invalid under the Supremacy Clause. The complaint alleged that the effect of those provisions was "to restrain commerce in the product market of wine in the State of New York by prohibiting wholesalers and retailers from competitive pricing which could benefit the consuming public..., [t]hat the provisions of the Alcoholic Beverage Control Law...and the conduct of Defendant Authority constitute a combination and conspiracy in restraint of trade and commerce in wine among the states", and that "by reason of the abovementioned illegal acts and practices, Defendant Authority has proximately caused injury to plaintiffs in the form of higher prices to them and to members of the general consuming public who purchase wine in the State of New York."

After answer and limited discovery, plaintiffs moved for summary judgment. Judge Owen denied the plaintiffs' motion in an opinion which held that the New York statute did not contravene §1 of the Sherman Act but that, if it did, conduct thereunder was insulated from attack under the antitrust laws by the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).[1] After the motion was decided, Peerless Importers Inc. (Peerless), another wholesaler of wines, was granted leave to intervene as a defendant in opposition to plaintiffs' motion. Thereafter the Authority and Peerless moved for summary judgment

in their favor. The judge granted the motions on the basis of his opinion denying plaintiffs' motion, and this appeal followed.

DISCUSSION

Section 101-b is entitled "Unlawful discriminations prohibited; filing of schedules; schedule listing fund". We quote §1 in the margin.[2] Section 2 makes it unlawful for any person who sells liquor or wine to discriminate in price, discounts for time of payment, or on quantity of merchandise sold between one wholesaler and another wholesaler or between one retailer and another retailer purchasing liquor or wine having the same brand or trade name and of like age and quality, or to grant any discount, rebate, free goods, allowance or other inducement of any kind except certian maximum discounts therein specified. Section 3(b), which is the object of plaintiffs' attack, provides that

> [n]o brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule...is filed with the liquor authority, and is then in effect[,]

unless "prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter." N.Y. Alco. Bev. Cont. Law §101-b(3)(b). Section 4 provides that the schedule required by paragraph 3(b) must be filed before the fifth day of each month and that the prices and discounts would become effective on the first day of the following calendar month and should remain effective for such month. Within ten days after the filing the Authority must make the schedules or a composite available for inspection by licensees. Within three days after the date provided for such inspection a wholesaler may amend his filed

schedule for sales to retailers in order to meet lower competing prices and discounts "provided such amended prices are not lower and discounts are not greater than those to be met." N.Y. Alco. Bev. Cont. Law §101-b(4).

I

For some of us who were "present at the creation" of the Twenty-First Amendment, there is an aura of unreality in plaintiffs' assumption that we must examine the validity of New York's Alcoholic Beverage Control Law (ABC Law) just as we would examine the constitutionality of a state statute governing the sale of gasoline. The Twenty-First Amendment was designed to end the "noble experiment" by which the Federal government endeavored to control the drinking habits of all citizens and to place control of alcholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by §1, the Amendment should give the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had hampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by §2 of the Twenty-First Amendment which provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicationg liquors, in violation of the laws thereof, is hereby prohibited.

In its first encounter with the Amendment, only three years after ratification, the Supreme Court, without disent, ruled that a state could impose a license fee on the importation of beer that would have been forbidden by the Commerce Clause itself. ***State Board of Equalization v.***

Young's Market Co., 299 U.S. 59, 64 (1936). The Court also posed, as a rhetorical question, "Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer...," *id.* at 63, something as antithetical to the Sherman Act as could be imagined.[3] Discussion continued in this vein until *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). Although Justice Stewart there made the frequently cited declaration quoted in the margin[4], *id.* at 332, and also said that a contention that the Twenty-First Amendment had somehow operated to "repeal" the Commerce Clause "would be patently bizarre and is demonstrably incorrect", *id.* at 331-32, the actual decision was the unsurprising one—although it did surprise two Justices—that the Amendment did not empower New York to prohibit the sale at John F. Kennedy International Airport of tax-free liquor for "ultimate dilivery and use...in a foreign country", *id.* at 333. Justice Stewart's remarks in *Idlewild* must also be read along with his observation, only two terms later, that in a case concerning liquor destined for use, distribution or consumption exclusively in New York—indeed another section of the very statute here at issue—"the Twenty-First Amendment demands wide latitutde for regulation by the State." *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966). However, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106-10 (1980), the Court gave further attention to the relation of state powers under the Twenty-First Amendment and the commerce power and, after noting that the Amendment gave the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system", *id.* at 110, concluded that:

> Although States retain substantial discretion to establish other liquor regulations, those controls may

> be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case". Hostetter v. Idlewild Liquor Corp. 377 U.S., at 332.

id. Since this appeal was argued, the Court has again stated that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause," *Bacchus Imports, Ltd. v. Dias,* 52 U.S.L.W. 4979, 4982-83 (U.S. June 29, 1984).[5]

Still this is not at all to say, as plaintiffs assume, that attacks on state regulation of the liquor business as conflicting with the antitrust laws are to be decided as if §2 of the Twenty-First Amendment did not exist. In *Bacchus Imports,* the Court referred to the language in *Midcal* that a "pragmatic effort [must be made] to harmonize state and federal powers," 445 U.S. at 109, and also to the statement in *Capital Cities Cable, Inc. v. Crisp,* 52 U.S.L.W. 4803, 4809 (U.S. June 18, 1984), that "whether the interest implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, not-withstanding that its requirements directly conflict with express federal policies." We hold that the challenged sections of New York's Alcoholic Beverage Control Law are not in direct conflict with §1 of the Sherman Act but that if they were, the interests of New York are entitled to prevail. We leave undecided the question whether Judge Owen was correct in relying, as an alternative ground for decision, on the proposition that New York's activity is protected by the state action doctrine.

II

Since §1 of the Sherman Act is directed only to "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce", 15 U.S.C. §1, plaintiffs have been faced form the outset with the difficulty that the challenged provisions of the Alcoholic Beverage Control Law do not compel any agreement. The schedules required to be filed by the wholesalers are their individual acts. Indeed the complaint does not allege any agreement among the wholesalers; it complains only of the acts of the Authority. In a case that had been wending its way throught the New York courts while this one has been pending in the district court and this court, the New York Court of Appeals considered a few sentences sufficient to dispose upon this ground of a challenge to subdivision 3 of section 101-b apparently identical to that made here. *Admiral Wine & Liquor Co. v. State Liquor Authority,* 61 N.Y.2d 858, 473 N.Y.S.2d 969 (1984), *modifying* 89 A.D.2d 522, 452 N.Y.S.2d 213 (1st Dept. 1982).

Plaintiffs continue to insist, however, as they did unsuccessfully in the district court and in the New York courts, that the case is ruled in their favor by *Midcal, supra.* Analysis of *Midcal* demonstrates that the contention is fallacious.

The California statutory scheme challenged in *Midcal* required that every "wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier...[who] own[ed] or control[led] a brand of wine resold to retailers or consumers...[m]ake and file a fair trade contract *and* a schedule of resale prices...." *See* Calif. Bus. & Prof. Code §24866(b) (emphasis supplied). Another section of the code imposed similar obligations on all wine brand owners

who were based outside the state. *See* Calif. Bus. & Prof. Code §24867 Price Posting was required only in those rare instances where there was no fair trade contract *See* Calif. Bus. & Prof. Code §24886(a), and, as will be seen, such posting was altogether different in its nature and effect from that required by New York. Finally, it was made unlawful for any licensee to purchase, sell or resell any wine at a price other than the one established by either the governing fair trade contract or by a posted price schedule. *See* Calif. Bus. & Prof. Code §24862. In short, California had created a resale price maintenance system for wine.[6]

In *Midcal Aluminum, Inc. v. Rice,* 90 Cal. App.3d 979, 153 Cal. Rptr. 757 (1979), the petitioner, a licensed wholesaler, which had been accused of selling wine at prices below those contained in a price schedule and of selling wine which was not covered by a "fair trade" contract, sought a determination that the California statute was unconstitutional. The California Court of Appeal for the Third Appellate District held that the statute violated the Sherman Act. The court also found that the California law was not protected by either "state action" immunity or §2 of the Twenty-First Amendment. The court considered that these holdings were required by the decision of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Board,* 146 Cal. Rptr. 585, 579 P.2d 476 (1978), where that court struck down similar restrictions on the sale of distilled liquors, there being nothing to show that the provisions with respect to wine had been enacted out of special solicitude for the California wine industry. When the respondent Director of Alcoholic Beverage Control argued that if the fair trade contract provision of the statute were to be held invalid, the wholesale price posting provision "should be severed from the invalid portions of the statutes," *Midcal,* 153

Cal. Rptr. at 761, the Court of Appeal declined to do this. It pointed out that the price posting provision was an incident of a legislative scheme to fix prices; that price posting was required only when there was no fair trade contract in effect; that price posting was intended to have the same effect as a fair trade contract, namely, to fix the price at which sales might be made by retailers; and that the Department had ruled that only one distributor could file a price schedule for any trading area and that this would bind all other distributors—indeed one of the charges against Midcal was that it sold wine for less that the prices contained in a schedule filed by a competing wholesaler. Hence the California court concluded that the price posting provision was an integral part of the price fixing scheme and was not severable.

The California Retail Liquor Dealers Association intervened as a defendant when the Alcoholic Beverage Control Department refused to appeal. The California Supreme Court declined to hear the case, doubtless because it regarded the decision of the Court of Appeal as following inevitably from its own previous decision in *Rice,* and the Dealers Association sought and obtained certiorari from the Supreme Court of the United States.

The Supreme Court was obliged to take the case as it found it. The California Court of Appeal had construed both parts of the statute, the fair trade contract provision and the alternative price posting provision, which was ruled to be nonseverable therefrom, to be part of a plan whereby all persons at various levels in the chain of distribution were forced to establish identical prices fixed by the brand owner for each brand of wine. Justice Powell was thus able to decide quite summarily that the scheme compelled by the California statute violated §1 of the Sherman Act. He said that "[t]he wine producer holds the

power to prevent price competition by dictating the prices charged by wholesalers", and quoted Justice Hughes' remark in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911), that such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions...by agreement with each other", and then passed on to the more difficult issues in the case, namely, whether the state's involvement was sufficient to establish antitrust immunity under *Parker v. Brown, supra,* 317 U.S. 341, and whether the California statute was within the protection of the Twenty-First Amendment, which we shall discuss below.

The challenged sections of the ABC Law plainly are not a resale price maintenance scheme of the sort condemned in *Midcal.* In contrast to *Midcal,* each wholesaler is completely free to file whatever price schedules he desires, and his schedule now has no controlling effect on retail prices since §101-bbb, which prohibited retail sales at a price less that that established in a retail price schedule, has been declared to be unconstitutional by the New York Court of Appeals. *See Mezzetti Associates, Inc. v. State Liquor Authority,* 51 N.Y.2d 761, 432 N.Y.S.2d 372 (1980). *Midcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more.

However, the inappositeness of *Midcal* is not the end of the matter. It can be argued that §101-b is never the less inconsistent with §1 of the Sherman Act since it forces each wholesaler to inform ever other wholesaler of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days), unless prior written permisssion of the SLA is

obtained,[7] and that if this had been done pursuant to an agreement, the agreement would have constituted a violation of §1 under such cases as *American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Sugar Institute v. United States,* 297 U.S. 553 (1936), and *United States v. Container Corp.,* 393 U.S. 333 (1969).[8]

An identical argument was rejected by Judge Blumenfeld in *United States Brewers Ass'n, Inc. v. Healey,* 532 F. Supp. 1312, 1329-30 (D. Conn.), *rev'd on other grounds,* 692 F.2d 275 (2 Cir. 1982), *aff'd,* 104 S. Ct. 265 (1983), on a challenge to a Connecticut posting statute similar to New York's except for the absence of the three day provision. He correctly distinguished *Midcal* as involving an implicit agreement for resale price maintenance and cited *Serlin Wine & Spirits Merchants, Inc. v. Healey,* 512 F. Supp. 936, 938 (D. Conn. 1981), *aff'd sub nom. Morgan v. Division of Liquor Control,* 664 F.2d 353, 355 (2 Cir. 1981).[9] He then applied our holding in *Modern Home Inst. v. Hartford Accident & Idemnity Co.,* 513 F.2d 102, 108-09 (2 Cir. 1975), that §1 of the Sherman Act "is directed only at joint action" and "does not prohibit indpendent business actions and decisions," and ruled that the Connecticut statute did not violate §1 simply because it compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation. *Brewers Ass'n,* 532 F. Supp. at 1330. This holding was adopted in *Enrico's Inc. v. Rice,* 551 F. Supp. 511 (N.D. Calif. 1982), *vacated as moot,* 730 F.2d 1250 (9 Cir. 1984), in rejecting an attack on a California administrative rule similar to the New York statute, which granted wholesalers the opportunity to match lower posted prices. The judge refused to follow a decision by the California Court of Appeal for the First District, in *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board,* 186 Cal. Rptr. 552, 557 (1982), *cert. denied,*

104 S. Ct. 193 (1983), which held, on a record showing price posting to have had an anticompetitive effect,[10] that the posting requirement "suffer[ed] from the same infirmity as the wholesale price posting requirements examined in *Midcal.*" Finally, *Miller v. Hedlund,* 579 F. Supp. 116 (D Ore. 1984), held that Oregon price posting and adherence provisions substantially similar to New York's, except for the absence of the three day meeting price provision, did not violate §1 of the Sherman Act because they did not "require inter-wholesaler agreement or concerted action," *id.* at 121, but that regulations requiring wholesale prices to be constant without regard to transportation conditions and forbidding quanity discounts would be preempted but were saved by *Parker v. Brown.*

We must confess to some doubt how the difference of opinion between the federal district courts and the New York Court of Appeals, on the one hand, and the California Court of Appeal, on the other, with respect to the "agreement" issue should be resolved. The position of the former is appealing. Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too "iffy". Against this, there is some force in the argument that a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under §1 is inconsistent with that section unless saved by *Parker v. Brown.*

We do not need to resolve that difficult question on this appeal in light of *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982). That case, also originating in California, involved a statute which provided that a licensed importer, through whom alone alcoholic beverages could be brought

into California, "shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." Calif. Bus. & Prof. Code §23672 (Supp. 1984). The California Court of Appeal for the Third District held that the statute was *per se* illegal under the Sherman Act and thus was invalid on its face. This time the Supreme Court reversed.

Justice Rehnquist began his opinion for the Court by laying down the governing standards 458 U.S. at 659:

> As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal anitrust laws simply because the state scheme might have an anticompetitive effect.

He then characterized *Midcal* as involving a statute that required members of the California wine industry "to file fair trade contacts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands." *Id.* (emphasis in original). The *Midcal* Court had held that "the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.* at 659-60 (emphasis in original). After referring to

Joseph E. Seagram & Sons, Inc. v. Hostetter, supra, 384 U.S. 35, he elaborated as follows, 458 U.S. at 661:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under §1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Addressing the statute there challenged, he referred to the holding in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), that a manufacturer's use of vertical non-price restraints was not *per se* illegal but rather should be scrutinized under the rule of reason since "restraints on intrabrand competition may promote interbrand ccompetition." *Norman Williams, supra,* 458 U.S. at 661. He regarded the California statute as merely enforcing "the distiller's decision to restrain intraband competition", leaving him free to designate as few or as many licensed importers as he pleased. *Id.* The statute thus was not facially invalid, although "[t]he manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be

subject to Sherman Act analysis under the rule of reason", *id.* at 662 (footnote omitted). Justice Rehnquist notd, 458 U.S. at 662-63 n.9, that because of the Court's resolution of the preemption issue, it was not necessary "to consider whether the statute may be saved from invalidation under the doctine of *Parker v. Brown,* 317 U.S. 341 (1943), or under the Twenty-first Amendment."

Application of the *Norman Williams* standard calls for affirmance here even if we were to accept *arguendo* the contention that an exchange of price information and price adherence compelled by a state are to be treated, for the purpose of antitrust preemption analysis, as if they were voluntary. The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams,* "necessarily constitutes a violation of the antitrust laws in all cases." Until *United States v. Container Corp.,* 393 U.S. 333 (1969), "[a] program to exchange price information was illegal only if, in addition to the agreement to exchange information, the defendants agreed to fix prices." Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation,* 63 Va. L. Rev. 639, 649 (1977) (footnote ommited). Whether or not there was such an agreement would depend on the nature of the information exchanged—broadly speaking, whether it was of the sort in *American Column & Lumber Co. v. United States, supra,* 257 U.S. 377, or of that in *Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925)—and on the presence of "conscious parallelism", i.e., identical or nearly identical pricing accompanied by "plus factors". See, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *United States v. General Motors Corp.,* 384 U.S. 127 (1966). But see, *e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537, 541 (1954); *Levitch v. Columbia Broadcasting System,*

Inc., 495 F. Supp. 648, 674-75 (S.D.N.Y. 1980), *aff'd* 697 F.2d 495 (2 Cir. 1983). Although *Container Corp., supra,* 393 U.S. at 334, upheld the sufficiency of a complaint charging "an exchange of price information but no agreement to adhere to a price schedule as in *Sugar Institute, v. United States,* 297 U.S. 553, or *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150", the decision was fact bound, the Court observing, *e.g.*, that the industry was "dominated by relatively few sellers", that "[t]he product is fungible and the competition for sales is price", and that "[t]he demand is inelastic, as buyers place orders only for immediate, short term needs." Justice Fortas, concurring, made clear his understanding that the Court's opinion did not "hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act," 393 U.S. at 338-39, and the Court has subsequently cited the Fortas opinion as support for saying that "the dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & Southern National Bank,* 422 U.S. 86, 113 (1975). Section 101-b thus does not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." New York wholesalers can fulfill all of their obligations under the statute without either conspriring to fix prices or engaging in "conscious parallel" pricing. So, even more clearly, the New York law does not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month.

In placing our decision upon *Norman Williams* and declining to decide between the two lines of authority with respect to the issue of agreement, we are, of course, acting

on the premise that this case is a facial attack on the statute and are leaving open the possibility of a challenge based upon its actual operation. We entertain no doubt that despite the factual material summarized in note 10 *supra,* itself scanty and inconclusive, the attack here was on the ground of facial unconstitutionality. The complaint was addressed to the face of the statute and claimed, erroneously as we have shown, that §101-b was similar to the California statute invalidated in *Midcal.* Plaintiffs themselves moved for summary judgment, asserting that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. When the judge ruled against them and the defendants moved for summary judgment on the basis of the judge's opinion, plaintiffs did not controvert their own assertions that there were no genuine factual issues. Indeed they made no claim of the existence of such issues on this appeal. We hold, on the authority of *Norman Williams,* that they failed to make out a case of facial invalidity.

III

The district judge held that if he had been wrong in concluding that §101-b is not preempted by §1 of the Sherman Act, the statute was nevertheless shielded from the antitrust laws by *Parker v. Brown, supra,* 317 U.S. 341 (1943). Although our conclusion that he was right in his holding in regard to preemption makes it unnecessary to go further so far as this court is concerned, we think it desirable to discuss the application of *Parker v. Brown* and also the balancing of federal and state interests required by the Twenty-First Amendment if §101-b was preempted and not saved by the state action exception.

Midcal established that in order for state activity in the control of the sale of alcoholic beverages to enjoy the

benefit of immunity for state regulation of private conduct, two tests must by met: "First, the challenged restraint must by 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself." *Midcal,* 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410 (1978) (opinion of Brennan, J.).

There can be no fair question that §101-b meets the first test, as demonstrated by the first subparagraph of the statute which we have quoted in note 2 *supra,* and the preamble quoted in part IV of this opinion. There is grave question, however, whether the second test is satisfied. *Midcal* held that it was not on the facts there presented, since California, having "authorize[d] price-setting and enforce[d] the prices established by private parties", neither established prices nor reviewed the reasonableness of the price schedules nor regulated the terms of the fair trade contracts, 445 U.S. at 105-06.

It can be argued with some force that the case with respect to §101-b is distinguishable. California sought to achieve a system of minimun resale prices, a goal clearly forbidden by the antitrust laws. Under such a system, the prevailing price level should have been of primary importance to the state. It was thus appropriate to require active state involvement in price setting as a condition to immunity. New York, in contrast, has sought only to produce orderly market conditions, specifically by preventing price discrimination. Under such a program there is nothing that the state can "actively supervise" except to see that the statutory requirements are obeyed—and there is no claim that the state has neglected this.

However, the most influential treatise on the subject, Areeda & Turner, 1 Antitrust Law ¶213d, at 75 (1978),

comes to a contrary conclusion. Posing a hypothetical quite similar to the instant case and assumming that unless exempt the practices would violate the antitrust laws, the authors would deny immunity since "[a]lthough the state legislature has decided that these practices would be desirable, it has created a continuing, unsupervised private power to act anticompetitively."[11] In *Miller v. Oregon Liquor Control Comm'n,* 688 F.2d 1222, 1225 (9 Cir. 1982), the court, quoting from the Areeda & Turner treatise, refused to apply *Parker v. Brown* so as to uphold self-executing State Liquor Commision regulations requiring wholesalers of beer and wine to post prices ten days prior to their effective dates and, in the case of price decreases, to maintain them for 180 days for malt beverages and 30 days for wine. Our own decision in *Morgan v. Division of Liquor Control, supra,* 664 F.2d 353, which held *Parker v. Brown* to be applicable, rested on the ground that Connecticut had there engaged in active supervision by requiring that a wholesaler's posted prices must not be less that his statutorily defined costs.[12] We must confess that there seems to us to be some anomaly in according immunity where a state's program is highly offensive to the antitrust laws, as was true in *Parker v. Brown* itself, provided only that the state involves itself to a certain degree in the iniquity, but in refusing to do so when the state's objective is less at variance with the antitrust laws and is accomplished by a method which requires nothing but policing. Since reliance on *Parker v. Brown* is unnecessary in this case, we think it best to say that we neither approve nor disapprove the alternative holding of the district court and leave the issue for another day.

IV

On the other hand, if we are wrong in thinking that §101-b is not in conflict with the antitrust laws in the sense

required by *Norman Williams* for a declaration of facial invalidity, here, in contrast to *Midcal,* the state's interest should prevail under the balancing process there prescribed for cases where the procompetition policy of the federal anitrust laws comes in conflict with a state's exercise of the authority reserved to it by §2 of the Twenty-First Amendment.

We begin by observing that the California statute's confrontation with federal policy in *Midcal* was as sharp as could be imagined. Contracts for resale price maintenance had long been held to be *per se* violations of §1 of the Sherman Act. *See, e.g., Dr. Miles Medical Co. v. John D. Park & Sons, supra,* 220 U.S. 373; *Albrecht v. Herald Co.,* 390 U.S. 145 (1968). Although states had been permitted to sanction these by the Miller-Tydings Act of 1937, see note 6 *supra,* in order to "protect small retail establishments that Congress thought might otherwise be driven from the market place by large-volume discounters", *Midcal, supra,* 445 U.S. at 102, Congress rescinded that permission by the Consumer Goods Pricing Act of 1975. California was thus attempting to continue, with respect to alcoholic beverages, exactly what Congress had condemned.

As against this strong federal interest, the Court found that California's interest was extremely weak. This finding was made rather easy by the attitude taken by California itself. Justice Powell remarked that, "As the unusal posture of this case reflects, the State of California has shown less that an enthusiastic interest in its wine pricing system," 445 U.S. at 111 n.12, adding that "the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal" which struck down the law. *Id.* Beyond this the Supreme Court of California in the *Rice* case, *supra,* 579 P.2d 476

(dealing with distilled liquors), which the Court of Appeal for the Third District found decisive in *Midcal,* 153 Cal. Rptr. 757, 760 (dealing with wine), had engaged in the balancing process and found the state's interest in resale price maintenance to be small. After saying that the Supreme Court accords "respectful consideration and great weight to the views of the state's highest court" on such a matter, quoting *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938), Justice Powell went on to summarize the findings of the California Supreme Court in *Rice.* That court had identified two purposes behind the California legislature's decision to prescribe resale price maintenance: "to promote temperance and orderly market conditions", the latter being primarily aimed at "protect[ing] small licensees from predatory pricing policies of large retailers." *Midcal,* 445 U.S. at 112 (quoting Rice v. Alcoholic Beverage Control Appeals Board, 579 P.2d at 490, 493). The state Supreme Court cited a study made by a state agency which showed that per capita liquor consumption in California had risen by 42% while resale price maintenance was in effect and a congressional study showing that states with fair trade acts had a higher rate of firm failures and a lesser rate of growth in small retail stores than free trade states. The state Supreme Court thus found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers", 579 P.2d at 494, and the Court of Appeal came to the same conclusion with respect to the wine trade. With the state courts thus having in effect given up the ghost, the state liquor agency making no attempt to defend the statute it was administering and only the state attorney general as *amicus* having a good word to say for the law, the Court had an easy time in concluding that nothing in the record suggested that the wine pricing system helped sustain small retail establishments or inhibited the consumption of alcohol by Californians, and

that "[t]he unsubstantiated state concerns put forward in [the] caser simply [were] not of the same stature as the goals of the Sherman Act."[13]

The situation here is quite different. As shown in Part II of this opinion, there is no such direct conflict between the antitrust laws and the state enactment as there was in *Midcal.* Moreover, the state interest is strong. In the 1964 repeal of the former system of resale price maintenance, the New York Legislature declared:

> § *8.* In enacting section eleven of this act [repealing the resale price maintenance law], it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribtion of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act [requiring that liquor price affirmations be filed] is, therefore, declared as a matter of legislative determination.

Act of April 16, 1964, ch. 531, 1964 N.Y. Laws 801, 807. Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-First Amendment. The Legislature thus at least thought it was promoting price competition. Furthermore it expressly found that "price discrimination and favoritism are contrary to the best interests and welfare of the people of this state"—a policy which is reflected in the federal antitrust laws, 15 U.S.C. § 13. There can be no doubt that requiring wholesalers to post their prices and to observe them for a month is an effective way, perhaps the only really effective way, of enabling the SLA to prevent price discrimination. The provision in§ 101-b(4) allowing a wholesaler, within three days after disclosure of the price schedules, to meet any lower price, while not strictly necessary to enforcement of the policy against discrimination, was a reasonable effort by the legislature to prevent the one month adherence provision from severely damaging the competitive position of a wholesaler who had posted prices even slightly above the lowest ones. Although it can be argued that this operates as a disincentive to reducing prices in the original filings, plaintiffs have not alleged this in their complaint, produced evidence that it has occurred, or shown that it has had deleterious effects. Since most brands are sold to all wholesalers at nearly the same price, as the Robinson-Patman Act generally requires, there is not much possibility of price competition at the wholesale level, see note 10 *supra.* On the otherhand, as was conceded at argument the AB Law has not prevented vigorous competition—both intrabrand and interbrand—among wine retailers. here also, in contrast to *Midcal,* those charged with administering the statue and the highest court of New York have identified it as embodying an important state policy. The "weighing" process prescribed by *Midcal* cannot mean that whenever a state statute has some anticompetitive effect, the federal interest prevails: unless

there is some anticompetitive effect,there is no occasion to weigh. At least upon a record such as this, § 2 of the Twenty-First Amendment dictates deference to the state.

Affirmed.

WINTER, *Circuit judge, dissenting:*

I respectfully dissent. I disagree with the majority's conclusion that the arrangements mandated by the New York legislation in question would not be *per se* violations of Section 1 of the Sherman Act if solely the result of an agreement among private firms. I therefore also take a different view of the application of *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97 (1980) and of the twenty-first amendment to this case.

It is true that arrangements that merely call for the exhange of price information are subject to rule of reason, rather than *per se,* analysis *United States v. Container Corp.,* 393 U.S. 333 (1969); *Maple Flooring Manufacturers Assn. v. United States,* 268 U.S. 563 (1925): American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). However, the challenged legislation not only mandates the exchange of price information but also requires adherence to publicly announced prices until thirty days after notice is given of a new price. A requirement of adherence to announced prices has been uniformly held illegal without regard to its reasonableness. *Sugar Institute v. United States,* 297 U.S. 553, 601 (1936) ("steps ... to secure adherence, without deviation, to prices and terms ... announced" are illegal). The Supreme Court emphasized as recently as 1980 the "plain distinction between the lawful right to publish prices ... on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other." *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 649-50 (1980) (per curiam). *See also United States v. Trans-Missouri Freight*

Association, 166 U.S. 290 (1897). The arrangement in question thus would be *per se* illegal if accomplished solely

Through private agreement, and our decision, therefore, is governed by *Midcal* rather than by *Rice v. Norman Williams Co.,* 458 U.S. 654 (1982). Indeed, to hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive effect of which is the subject of great controversy, *see* R. Bork, *The Antitrust Paradox* 288-91 (1978), but to allow them to authorize horizontal price fixing, about which all agree.

I also do not share the majority's concern that the arrangement here is compelled by law rather than achieved through private arrangement. The relevant issue under the supremacy clause has to do with the degree to which a state may bring about the very anti-competitive arrangements the Sherman Act was designed to avoid. Whether a state merely authorizes private parties to fix prices or compels them to do so may of course be relevant to the first part of the two-part *Midcal* test, namely whether the challenged restraint is "clearly articulated and affirmatively expressed as state policy". 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389, 410 (1978)). Nevertheless, the fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the supremacy clause.

I also conclude that the legislation in question fails the *Midcal* test. Although the policy of creating the cartel in question is surely "one clearly articulated and affirmatively expressed" by the state, the legislation fails to meet the second part of the *Midcal* test, namely that "the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana*

Power and Light Co., 435 U.S. at 410). As was the case with the California legislation at issue in *Midcal*, New York does nothing whatsoever to establish the actual prices charged, review their reasonableness, monitor market conditions, or engage in reexmination of the program. As in *Midcal*, [t]he national policy in favor of competition [is] thwarted by casting ... a gauzy cloak of state involvement over what is essentially a private pricefixing arrangement." 445 U.S. at 106.

Our decision in *Morgan v. Division of Liquor Control*, 664 F. 2d 353 (2d cir. 1981) is not to the contrary. In that, case, we held that Connecticut legislation met the second part of the *Midcal* test because it set a floor for prices established by an express statutory formula and allowed free competition above that floor. In the present case, the only "monitoring" of the state program lies in the provision that responsive price changes cannot be lower than those announced by competitors. That provision, which heightens rather than monitors the anti-competitive impact of the legislation, hardly satisfies the second part of the *Midcal* test.

While I quite agree with Judge Friendly's observations that we should not treat the twenty-first amendment as though it had no application at all to the present case, I do not perceive it to be of any great importance given my view of the New York legislation. Although the statute expresses a concern over the perils of cheap (competitively priced) liquor, the notion that this legislation was even remotely the result of political pressure exerted by aroused temperance groups is a quaint fiction. The self-evident purpose of the statute is to create a cartel of liquor wholesalers for their benefit. Athough I believe that the twenty-first amendment allows a state to limit consumption of alcohol by causing its price to be high, I also

believe that in such an instance a state must do something more than authorize a cartel of dealers to seek out their profit maximizing price/output level. The issue need not be elaborated in dissent beyond stating my view that where state legislation merely legislates a cartel of liquor dealers and plays no further role in determing prices and output, its self-evident purpose is not to protect the public from the evils of the demon rum, but to preserve the high standard of living of those who sell it. Since the twenty-first amendment was plainly designed only to allow the states to legislate against the evils of intoxicating liquors rather than to reward its purveyors, I see no room for its application in the present case.

I therefore dissent.

APPENDIX B
JUDGMENT OF THE CIRCUIT COURT
FILED 9/21/84

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of September, one thousand nine hundred and eighty-four.

Present: HON. HENRY J. FRIENDLY
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. RALPH K. WINTER
Circuit Judges,

JACK R. BATTIPAGLIA and BACCHUS SELECTIONS INC.,

Plaintiffs-Appellants,

v.

NEW YORK STATE LIQUOR AUTHORITY,

Defendant-Appellee,

PEERLESS IMPORTERS, INC.,

Defendant-Intervenor.

UNITED STATES COURT OF APPEALS
FILED
SEPT 21, 1984
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith,
Clerk
s/ Edward J. Guardaro
By: Edward J. Guardaro
Deputy Clerk

APPENDIX C
OPINION OF THE DISTRICT COURT
DATED 9/27/82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK R. BATTIPAGLIA and
BACCHUS SELECTIONS, INC.,

Plaintiffs,

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Defendant.

OPINION AND ORDER
80 Civ. 5701

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OWEN, District Judge

The plaintiffs are an owner of a retail package store and a wholesaler of wines. Defendant is the New York State Liquor Authority ("SLA"), charged by the New York State Legislature with intrastate regulation and administration of the alcoholic beverage industry. Plaintiffs allege that section 101-b of the New York State Alcoholic Beverage Control Law (the "ABC" Law) conflicts with Section 1 of the Sherman Act, 15 U.S.C. § 1, and is thereby constitutionally invalid pursuant to the Supremacy Clause. U.S. Const. Art VI. By the instant motion, plaintiffs seek summary judgment. Because I find no conflict between the challenged statute and the federal antitrust laws, plaintiff's motion is denied.

The attacked section, Section 101-b, requires that manufacturers and wholesalers of wine and liquor file monthly with the SLA a schedule which includes the price at which their product will be offered to purchasers and a statement that such offerings will be made either at the posted price or at a discount of no more than an amount set by the statute. It further allows competing manufacturers, wholesalers, and the public to review the prices once posted and within three days of such review allows wholesalers to adjust their prices downward—but not upward—in order to meet competition. The purpose of the regulatory structure is to prevent unfair and unreasonable price discrimination to the benefit of favored buyers resulting in a disorderly market.

Plaintiffs claim, however, that these provisions have resulted in injurious anticompetitive effects insofar as they

are burdening trade between wholesalers and retailers, effectively eliminating price competition among wholesalers, and creating a market where all wholesalers offer their identical products to retailers at identical prices. As a consequence of the identity of prices at the wholesale level, plaintiffs conclude, competition at the retail level has been impaired. This is impermissible, plaintiffs urge, claiming that Section 1 of the Serman Act preempts Section 101b of the ABC Law. They cite in support *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Plaintiffs motion raises three issues of law. First, does the regulatory scheme mandated by Section 101b-3 conflict with the Sherman Act? Second, assuming that the challenged statute mandates conduct which among private parties would violate the Sherman Act, does the "state action" doctrine immunize that conduct from the operation of the federal antitrust laws? *See Parker v. Brown,* 317 U.S. 341 (1943). Finally, assuming that the answer to the first question is "yes" and to the second question "no", does the 21st Amendment insulate the challenged statute from the operation of the Sherman Act? Because I determine that the challenged statute on its face does not encourage conduct that runs afoul of the Sherman Act, I deny plaintiff's motion. Moreover, I conclude that even if the challenged statute were found to be in conflict with the federal law, the "state action" doctrine would immunize it from antitrust challenge. Because of the conclusions reached on these first two issues, I express no opinion on the impact of the 21st Amendment upon these facts.

A. Section 101-b Does Not Conflict with Section 1 of the Sherman Act

Whether plaintiffs object to the sharing of price information, the freezing of prices, or the effect of these and other practices on transactions between different levels of the industry, section 101-b, at bottom, is a price-posting rather than a resale price maintenance statute. It requires that each wholesaler publish the prices at which it will sell its products to retailers, permits adjustment *downward* to meet competition, and mandates that it will maintain any prices for a 30-day period. The statute also requires that retailers purchase only liquor and wine sold in compliance with this system. In all other material respects, Section 101-b is silent about retail sales.

Invoking both *Midcal Aluminum Inc., supra,* and *William J. Mezzetti Associates, Inc. v. State Liquor Authority* 51 NY2d 761, 432 NYS2d 372 (1980), plaintiffs contend that Section 101-b restrains trade. However, in *Midcal, supra,* 445 U.S. at 102, a resale price maintenance statute was at issue. Similarly in *Mezzetti,* a resale price maintenance provision in the state liquor law was struck down.

Of greater applicability to this case is *Serlin Wine & Spirit Merchants, Inc. v. Healy,* 512 F. Supp. 936 (D.Conn.), *aff'd sub nom. Morgan v. Division of Liquor Control,* 669 F.2d 353 (2d Cir. 1981), which upheld the Connecticut Liquor Control Act against a Sherman Act challenge alleging illegal price fixing and resale price maintenance. In Connecticut, at the initial level of distribution, the manufacturer or out-of-state shipper is required to file with the state a list of prices at which it will sell its products to Connecticut wholesalers in the following month. At the second level, the wholesaler must file

with the state a list of prices at which it will offer its products to retailers; this price can be no lower than the wholesalers "cost", as defined by the statute. At the third level, retailers may sell their products at a price not below retailers' "cost". Id. at 938. Plaintiffs, in *Serlin,* alleged that this distribution plan was violative of the federal antitrust laws insofar as it allowed manufacturers to control prices at the retail level.

The court, however, found that each party set only its sale prices and that the state, not the parties, set the price *range* at lower levels of distribution. In the California liquor industry resale prices down the line were set by producers, with the state merely enforcing the prices so established.

The New York ABC laws obviously operate in the Connecticut mold rather than the California mold. Section 101-b requires each manufacturer and wholesaler to post its prices and permits adjustment much as does the Connecticut statute. It does not, as the California statute did, go the further step and allow resale price maintenance.

I therefore conclude that there is no conflict between Section 101-b and the Sherman Act.

B. The State Action Doctrine Insulates Section 101-b3 from the Operation of the Sherman Act

Even were I to find conduct under the state statute offensive under the federal antitrust laws, such conduct would nevertheless be permissible under the state action doctrine. In *Parker v. Brown,* 317 U.S. 341 (1943), the Supreme Court expressed its reluctance to tamper with state regulations in the name of the federal antitrust laws,

and in *Midcal,* the court explained the requisite state interest to establish antitrust immunity:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Midcal, supra 445 U.S. at 105, *quoting City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410 (1978).

The New York ABC Laws meet these criteria. As to the first, the statute itself articulates a state policy favoring comprehensive regulation of the idustry. *See* Alcoholic Beverage Control Law § 2. Intrastate regulation of alcoholic beverages is clearly an area of regulation entrusted to the states. *See* U.S. Const. amend. XXI. As to the second, it can hardly be denied that the state's supervision in the area is anything but active. New York state itself regulates the monthly price-postings and adjustments.

Given the foregoing, I need not consider the applicability of the 21st Amendment to these facts. The plaintiffs' motion for summary judgment is denied.

So ordered.

United States District Judge

Dated: September 27, 1982
New York, New York

JUDGMENT OF THE DISTRICT COURT DATED 2/5/84

APPENDIX "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK R. BATTIPAGLIA & BACCHUS SELECTIONS, INC.

Plaintiffs

-against-

NEW YORK STATE LIQUOR AUTHORITY

Defendant

-and-

PEERLESS IMPORTERS, INC.

Defendants-Intervenor

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JUDGMENT

Defendant(s) having moved for summary judgment and the said motion(s) having come before the Honorable Richard Owen United States District Judge, and the Court thereafter on February 3, 1984, having handed down its memorandum endorsements, granting the said motion(s), it is,

ORDERED,. ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, as to both defendants.

DATED: NEW YORK, N.Y.
February 5, 1984

FOOTNOTES

1. Judge Owen added that, "Given the foregoing, I need not consider the applicability of the 21st Amendment to these facts."

2. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promotion temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

See also the preamble quoted in Part IV *infra.*

3. While such action by a state would now be immune from antitrust attack under *Parker v. Brown,* there is nothing to indicate that the *Young's Market* Court was peering that far into the future or thought that any such justification was required.

4. Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the

issues and interests at stake in any concrete case.

5. Three Justices believed that the decision, with the facts of which we need not here concern ourselves, was inconsistent with §2 of the Twenty-First Amendment. *Bacchus Imports,* 52 U.S.L.W. at 4983 (Stevens, J., dissenting).

6. When originally enacted, California's "fair trade" system was protected from Sherman Act preemption by the Miller-Tydings Resale Price Maintenance Act of 1937, 50 Stat. 693, which exempted from federal anti-trust laws state statutes sanctioning resale price maintenance. The Miller-Tydings Act was repealed by the Consumer Goods Pricing Act of 1975. *See* 89 Stat. 801 (1975).

7. The record contains no information as to what use has been made of this provision.

8. A partial answer might be that, except for action taken under the three day provision, no wholesalers' prices will be, although he knows what their previous prices were.

9. The district court decision in *Serlin* rested both on the lack of any element of agreement and on *Parker v. Brown.* Although this court affirmed "essentially on the grounds stated in Judge Daly's well-reasoned opinion" and noted that "the Connecticut statutes do not authorize or compel private parties to enter contracts or combination to fix prices in violation of §1 of the Sherman Act," our discussion focused on the availability of *Parker v. Brown* immunity. *Morgan,* 664 F.2d at 355, 356.

10. The court summarized the evidence in a footnote:

8. For *inter*brand competition, in 1955, per case prices of the leading gins varied $2.71 per case or approximately 7 percent. In 1975, the difference per case between the highest and lowest leading gin was a single cent. During the same period the case price of bourbons, excluding Ten High, narrowed from $13.47 (14%) variance to $.47 (1%). The leading scotch whiskeys went from $.50 per case variance equal to 9/10 percent to $.29 per case variance or 3/10 percent.

For *intra*brand competition, with one exception, every wholesaler who sold one of the leading brands of gin, scotch wiskey or straight whiskey charged the same per case price as his competitors.

Additionally, during the 15-month period prior to the hearing there were only two instances where the price of one of the analyzed brands was reduced. In November and December 1979, John Walker Red and Gordon's Gin were reduced in price; during those two months every wholesaler in Northern California who handled that brand made the exact same price reduction. The following January, each increased his price to the same amount charged by their competitors. *Lewis-Westco,* 186 Cal. Rptr. at 557 n.8.

The only evidence approaching this in the present record is a portion of Battipaglia's affidavit in support of plaintiffs' motion for summary judgment which states that for five of the largest selling brands of wine, which were distributed by six or more wholesalers, there were several months in which there was wholesale price uniformity and other months in which there were price disparities, ranging in the case of one wine from 10% to 13%. Peerless endeavors to explain the uniformity on the basis that each wholesaler pays the same price to the supplier, that most of the wholesalers are parties to the same collec-

tive bargaining agreement, and that the costs of goods, wages and fringe benefits amount to 95% of a wholesaler's total costs. Peerless argues further that there is vigorous inter-brand competition among wines.

11. Query whether the necessary supervision would be furnished if the SLA were required to monitor the filings and report any evidence of agreement on prices to the legislature.

12. These included a minimum mark-up of 11% on spirits and cordials, 20% on wine bottled outside Connecticut and beer, and 36% on wine bottled within Connecticut. Conn. Gen. Stat. §§30-68, 30-68e, 30-68j (1975).

13. The Court reserved the question "whether the legitmate state interest in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." 445 U.S. at 113-14.